FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2008-327-M
v.	:	A.C. No. 09-00264-133436
ATLANTA SAND & SUPPLY COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY: Jordan, Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 19, 2008, the Commission received from Atlanta Sand & Supply Company, Inc. ("Atlanta Sand") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On December 6, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000133436 to Atlanta Sand, proposing penalties for nine citations that had been issued to the company in August 2007. According to Atlanta Sand, it engaged in informal conferences with MSHA regarding the citations. The operator states that when it was not successful in obtaining all of the modifications to the citations it sought, it resolved to request a hearing once the penalties for the citations were proposed. However, due to a miscommunication between Atlanta Sand and its counsel, a contest of the proposed assessment was never filed. The Secretary states that she does not oppose Atlanta Sand's request to reopen the proposed penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

In its motion, the operator states only that its failure to timely contest the penalty involved "an unintentional error in the transfer of the Proposed Assessment from Atlanta Sand to counsel" which resulted in a "misunderstanding regarding whether the penalties were mailed to counsel and counsel's not learning that the penalties had been assessed until after the time for filing a hearing request had run." Because Atlanta Sand provides no specific facts justifying relief, we deny its motion without prejudice.

Atlanta Sand bases its request to reopen on Rule 60(b) of the Federal Rules of Civil Procedure. However, in a recent case involving a motion to reopen pursuant to Rule 60(b), the Commission denied without prejudice an operator's request that was based merely on "clerical error," because this was not "a sufficiently detailed explanation." *Eastern Associated Coal LLC*, 30 FMSHRC _____ , slip op. at 1-3, No. WEVA 2008-488 (May 16, 2008). In that decision, in which we noted the failure of operators to "provide meaningful explanations for their failure to timely contest proposed penalty assessments" in several other cases, the Commission insisted that if the operator chose to refile its request to reopen, it must "disclose with specificity its grounds for relief." *Id*. at 3, n.2.

Similarly, in *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007), the motion to reopen was based on general assertions of "clerical error, mistake and excusable neglect" so that "the citations were misplaced and not timely responded to." The Commission denied the request without prejudice due to the operator's failure to provide any specific explanation to justify its failure to file a timely contest and required the operator to disclose with specificity its grounds for relief if it decided to refile. *Id*. at 570-71.

Just as the motions in *Eastern Associated* and *James Hamilton* were found to be insufficiently clear, the submission by Atlanta Sand fails to provide sufficient information to determine whether or not good cause may exist to reopen the final order. Indeed, the motion is so lacking in facts that it does not even provide a basis for a remand of the matter to an administrative law judge.

The federal courts, like the Commission in the above-cited cases, have required specificity in motions filed pursuant to Rule 60(b). In *Park Corp. v. Lexington Insurance Co.*, 812 F.2d 894 (4th Cir. 1987), for example, the Fourth Circuit affirmed the district court's denial of Lexington's motion for relief from a judgment (entered due to its failure to respond to a complaint) filed pursuant to Rule 60(b)(1) and (6). *Id*. at 896. In support of its motion, Lexington had filed only an affidavit explaining that the summons and complaint were received in the mail room, signed for by a Lexington employee, disappeared, and thus were not brought to the attention of the appropriate staff so that the matter could be referred to an attorney and an answer filed. *Id*. at 897. The Fourth Circuit stated that because Lexington could give no reason for the loss of the documents, the district court could not determine whether it had an acceptable excuse for the default. *Id*. In holding that the district court did not abuse its discretion, the Fourth Circuit noted that "to hold otherwise would be to allow defaulting defendants to escape the consequences of their inaction simply by asserting that the legal process to which they failed to respond was lost." *Id*.

In a similar case in which a 60(b) motion was based on the disappearance of a summons and complaint, the district court, in denying the motion, emphasized that "[w]here a party asserts excusable neglect as the basis for its omission, it is insufficient for the party to state simply that the summons and complaint, once properly accepted, disappeared." *UMWA v. Banner Coal & Land Co.*, 2006 WL 4524337, at *3 (S.D. W.Va. 2006).

Also, in *U.S. v. $3,216.59 in U.S. Currency*, 41 F.R.D. 433, 434 (D.S.C. 1967), the district court denied a Rule 60(b) motion that had alleged the default was due to "excusable neglect and mistake of counsel." It emphasized that

> "[i]t is not enough that movant assert that this default resulted from a mistake. He must go farther. The nature of the mistake itself must be stated, so that the Court may determine whether it is such a mistake as to warrant relief under 60(b). Rule 9, Rules of Civil Procedure expressly requires that in all averments of mistake "the circumstances constituting . . . mistake shall be stated with particularity."

Id. at 435 (citation omitted). The Court noted that the affidavit upon which the movant based his motion nowhere stated the nature of the mistake made by the attorney. *Id*.

Moreover, in *Vela v. Western Electric Co.*, 709 F.2d 375, 377 (5th Cir. 1983), the Fifth Circuit upheld the district court judge's refusal to grant relief when counsel for plaintiffs asserted that his default was due to "excusable neglect" but advanced no explanation for his dereliction. *See also* 21A Fed. Proc., L.Ed. § 51.139 (2008) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity. . . . Thus, it is

insufficient for a movant to assert that his or her default resulted from a mistake; rather, the movant must assert the nature of the mistake so that the court may determine whether it is a mistake warranting relief under Rule 60(b)(1) – and this averment must be in the moving papers and not merely in the argument."). Thus, whether it is the disappearance of documents, a mistake by counsel, or, as asserted in this case, a miscommunication with counsel, terse justifications do not suffice as a basis for relief.

The Commission has recognized that Rule 60(b) "'is a tool which . . . courts are to use sparingly . . . .'" *JWR*, 15 FMSHRC at 789 (citation omitted). Consequently, a grant of relief pursuant to 60(b) – or a remand to an administrative law judge – should not be based on general assertions or conclusory statements as to why an operator failed to timely contest a penalty assessment. Rule 60(b) was not intended as a license for parties to fail to exercise due diligence in regard to litigation. *See* Brett Warren Weathersbee, Note: *No More Excuses: Refusing to Condone Mere Carelessness or Negligence under the "Excusable Neglect" Standard in Federal Rule of Civil Procedure 60(b)(1)*, 50 Vand. L. Rev. 1619, 1646 (Nov. 1997). Consequently, we consider the submissions of Atlanta Sand to be insufficient, and deny the motion without prejudice.

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

Chairman Duffy, dissenting:

Having reviewed Atlanta Sand's request and the Secretary's response, in the interests of justice, I would remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Atlanta Sand's failure to timely contest the penalty proposal and whether relief from the final order should be granted. Unlike in the recent Commission cases denying reopening that are cited by my colleagues, Atlanta Sand did not merely recite the words of Rule 60(b) in asking for relief from its failure to contest the penalty on a timely basis. It offered a general explanation of where in the process of contesting the penalty it erred and presented a cogent argument in favor of our invoking the equitable relief provided by recourse to the guidance of Rule 60(b).

Indeed, I note for the record that within the past year, this Commission granted this same operator's motion to reopen a penalty assessment that had become a final order on the grounds that the operator had "inadvertently omitted the proposed assessment in the records that it transferred to counsel." *Atlanta Sand & Supply Co.,* 29 FMSHRC 754 (Sept. 2007). The operator's grounds for relief in that instance, a mis-communication between client and counsel, are substantially similar to those presented here. If we are adopting a more rigorous standard for considering the merits of reopening proceedings on the basis of the equity considerations inherent in Rule 60(b), it will come as an unpleasant surprise to this operator.

While Atlanta Sand's explanation could have been more detailed, the lack of detail did not lead the Secretary to oppose the motion to reopen. In a case like this, where a general and plausible explanation has been offered and the Secretary does not oppose the motion, I do not believe the administration of the Mine Act is advanced by requiring the operator to resubmit a more detailed motion to the Commission, which, if the past is prologue, will likely remand it to Chief Administrative Law Judge for the ultimate determination on whether reopening is warranted.

Lastly, I am troubled by the majority's strict reliance upon federal court case law under Rule 60(b). Commission Procedural Rule 1 is quite clear. First, "[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . the Commission and its Judges *shall be guided so far as practicable* by the Federal Rules of Civil Procedure . . . ." 29 C.F.R. § 2700.1(b) (emphasis added). Secondly, the Commission's rules "shall be construed to secure the just, speedy and inexpensive determination of all proceedings . . . ." 29 C.F.R. § 2700.1(c). In none of the four federal court cases applying Rule 60(b) that are cited by my colleagues is there any indication that the motion to reopen was unopposed. Consequently, given our prior treatment of this operator, I fail to see how it is "practicable" to use such cases as "guidance" in this instance, and do not believe doing so leads to either a "speedy" or "inexpensive determination" in this proceeding.

Moreover, the Commission is not a federal court and is thus not bound by strictures that may prevail in such a setting. For example, Commission hearings are not conducted in strict

accordance with the Federal Rules of Evidence; on the contrary, our rules unequivocally allow for the admission of hearsay testimony. 29 CFR § 2700.63(a).

Over the past year the Commission has experienced an unprecedented increase in the number of cases filed before it. New filings are approaching a five-fold increase over filings two or three years ago. Requests to reopen appear to have increased proportionately. It may well be that the Commission needs to reconsider the circumstances under which it affords relief in cases such as this one before us now. I do not, however, believe that it is productive to conduct that reconsideration piecemeal through adjudication. The mine safety community may be better served by a rulemaking proceeding addressing motions to reopen final Commission orders. In such a proceeding interested parties could state their views on what extent, if any, Rule 60(b) and the cases interpreting and applying it should inform the Commission's decisions on motions to reopen.

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Michael F. Duffy, Chairman

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